

1 JAMES R. OLSON, ESQ.
2 STEPHANIE M. ZINNA, ESQ.
3 OLSON, CANNON, GORMLEY,
4 ANGULO & STOBERSKI
5 9950 West Cheyenne Avenue
6 Las Vegas, NV 89129
7 Phone: 702-384-4012
8 Fax: 702-383-0701
9 jolson@ocgas.com
10 szinna@ocgas.com

11 Attorneys for Defendant
12 DOLLAR TREE STORES, INC.

13 **UNITED STATES DISTRICT COURT**

14 **DISTRICT OF NEVADA**

15 YELE GLASTER, individually,)
16 Plaintiff,)
17 vs.)
18 DOLLAR TREE STORES, INC., a)
19 foreign corporation; DOES I - X, and)
20 ROE CORPORATIONS XI - XX,)
21 inclusive,)
22 Defendant.)
23 _____

24 CASE NO. 2:15-CV-252-MMD-VCF

25 **DEFENDANT DOLLAR TREE
26 STORES, INC.'S MOTION
27 TO STRIKE PLAINTIFF'S
28 EXPERT JOHN R. PETERSON
PURSUANT TO FRCP 37(b)(2)(A)**

18 COMES NOW, Defendant DOLLAR TREE STORES, INC. ("Dollar Tree"), by and
19 through its attorneys of record, James R. Olson, Esq. and Stephanie Zinna, Esq. of the law firm
20 of OLSON, CANNON, GORMLEY, ANGULO & STOBERSKI, and hereby submits its Motion
21 to Strike Plaintiff's Expert John R. Peterson Pursuant to FRCP 37(b)(2)(A).

22 **I. INTRODUCTION**

23 Dollar Tree duly noticed the deposition of Plaintiff's expert John R. Peterson on August
24 19, 2015, setting his deposition for September 3, 2015. See Exhibit C. Plaintiff requested to
25 continue the deposition to a later date, as Mr. Peterson was not available on September 3, 2015.
26 Dollar Tree agreed, provided Plaintiff agreed to an extension of discovery and provided a new
27 date for the deposition. No response was received. Dollar Tree took a Notice of Non-
28

1 Appearance for John R. Peterson on September 3, 2015.¹ Dollar Tree now moves to strike the
 2 designation of Mr. Peterson as an expert as a sanction for his failure to comply with the Notice of
 3 Deposition.

4 **II. STATEMENT OF FACTS**

5 Plaintiff disclosed John R. Peterson as her expert on June 18, 2015. Dollar Tree served
 6 the Notice of Taking Deposition of Mr. Peterson on August 19, 2015, setting his deposition for
 7 September 3, 2015. *See Exhibit C.* Plaintiff did not object to the Notice of Taking Deposition.

8 On or about August 28, 2015, Plaintiff's counsel first requested the deposition of Mr.
 9 Peterson be continued. Dollar Tree agreed to the continuance, provided that discovery would be
 10 extended for 30 days and a new date was provided to Dollar Tree in order to continue, rather than
 11 vacate, the deposition. No response was received to these requests.

12 On or about September 1, 2015, Plaintiff's counsel agreed to extend discovery for 30 days
 13 to allow Mr. Peterson's deposition to go forward and to provide Dollar Tree with a new date.
 14 *See Exhibit F.* Thereafter, Plaintiff's counsel took issue with the proposed Stipulation and Order
 15 to Extend Discovery. *See Exhibit G.* Namely, Dollar Tree included a section in compliance with
 16 LR 26-4(b) delineating remaining discovery to be conducted. *Id.* Plaintiff believed this section
 17 "limited" discovery. Dollar Tree requested Plaintiff propose language to comply with the rule.
 18 *See Exhibit H.* Plaintiff refused, and provided no further information regarding Mr. Peterson's
 19 deposition. Dollar Tree took a Notice of Non-Appearance for John R. Peterson on September 3,
 20 2015.

21 **III. LEGAL ARGUMENT**

22 **A. The Court Should Sanction Plaintiff Pursuant to FRCP 37(b)(2)(A) and (C)**

23 FRCP 37(b)(1) states that "[i]f the court where the discovery is taken orders a deponent to
 24 be sworn or to answer a question and the deponent fails to obey, the failure may be treated as
 25 contempt of court." Dollar Tree issued a Notice of Deposition. Plaintiff did not object to the
 26 Notice of Deposition or seek a protective order. Plaintiff was aware that Dollar Tree wished to

27
 28 ¹ Dollar Tree has not yet received the transcript from the Notice of Non-Appearance and will provide it to the Court immediately upon receipt.

1 take Mr. Peterson's deposition. Indeed, when Dollar Tree initially noticed the deposition, Dollar
 2 Tree attempted to coordinate a date with Plaintiff's counsel's office and no response was
 3 received. Thus, Dollar Tree moved forward with noticing the deposition for September 3, 2015.

4 At all times Dollar Tree was amenable to moving the deposition, provided the parties
 5 stipulated to extend discovery and Plaintiff provided an alternate date. Plaintiff refused to do so,
 6 and instead forced Dollar Tree to take a Notice of Non-Appearance.

7 FRCP 37(b)(2)(A) provides that:

8 If a party...fails to obey an order to provide or permit discovery...the court where the
 9 action is pending may issue further just orders. They may include the following:

- 10 (i) directing that the matters embraced in the order or other designated facts be
 taken as established for purposes of the action, as the prevailing party claims;
- 11 (ii) prohibiting the disobedient party from supporting or opposing designated
 claims or defenses, or from introducing designated matters in evidence;
- 12 (iii) striking pleadings in whole or in part;
- 13 (iv) staying further proceedings until the order is obeyed;
- 14 (v) dismissing the action or proceeding in whole or in part;
- 15 (vi) rendering a default judgment against the disobedient party; or
- 16 (vii) treating as contempt of court the failure to obey any order except an order to
 submit to a physical or mental examination.

17 FRCP 37(b)(2)(C) provides:

18 Instead of or in addition to the orders above, the court must order the disobedient party,
 19 the attorney advising that party, or both to pay the reasonable expenses, including
 20 attorney's fees, caused by the failure, unless the failure was substantially justified or other
 21 circumstances make an award of expenses unjust.

22 Plaintiff's outright disregard for the litigation process, including a lack of professional
 23 courtesy, has caused Dollar Tree to again incur significant costs and expenses. Dollar Tree
 24 requests the Court strike Mr. Peterson and impose an award of attorney's fees and costs as a
 25 sanction, and any other sanction the Court deems just and reasonable. In the alternative, Dollar
 26 Tree requests reimbursement of the fees and costs expended in taking the Notice of Non-
 27 Appearance and requests an extension of discovery in order to depose Mr. Peterson.

28 IV. CONCLUSION

29 Plaintiff has disregarded the discovery process, prejudiced Dollar Tree, and delayed this
 30 litigation. Dollar Tree requests the Court sanction Plaintiff pursuant to FRCP 37(b)(1), FRCP
 31 37(b)(2)(A) and (C), including striking John R. Peterson for his failure to appear for deposition,
 32 and award Dollar Tree attorney's fees incurred in connection with this Motion and taking the

1 Notice of Non-Appearance for Mr. Peterson's deposition. In the alternative, Dollar Tree requests
2 reimbursement of its fees and costs expended in connection with the Notice of Non-Appearance
3 and that the Court reopen the discovery period to permit Mr. Peterson's deposition to go forward.

4 DATED this 15th day of September, 2015.

5 OLSON, CANNON, GORMLEY,
6 ANGULO & STOBERSKI

7 By 

8 JAMES R. OLSON, ESQ.
9 STEPHANIE M. ZINNA, ESQ.
10 9950 West Cheyenne Avenue
11 Las Vegas, Nevada 89129
12 Attorneys for Defendant
13 Dollar Tree Stores, Inc.

1 **AFFIDAVIT OF STEPHANIE ZINNA, ESQ. IN SUPPORT OF RENEWED MOTION TO**
2 **EXCLUDE UNDISCLOSED DAMAGES IN COMPLIANCE WITH LR 26-7**

3 STATE OF NEVADA)
4 COUNTY OF CLARK)
5

6 I, STEPHANIE ZINNA, ESQ., being duly-sworn hereby depose and affirm
7

- 8 1. That Affiant is a duly-licensed attorney practicing law in the State of Nevada, Bar
9 No. 011488, and is an associate with the law firm of OLSON, CANNON,
10 GORMLEY, ANGULO & STOBERSKI, the attorneys of record for Defendant
11 Dollar Tree Stores, Inc.
- 12 2. After multiple attempts to obtain Plaintiff's cell phone records, it became apparent
13 Affiant would not be able to obtain and produce said records prior to the close of
14 discovery on September 8, 2015.
- 15 3. On August 17, 2015, Affiant emailed Plaintiff's counsel regarding a stipulation
16 and order to extend discovery for the purpose of obtaining phone records. *See*
17 Exhibit A.
- 18 4. Affiant received no response.
- 19 5. On August 19, 2015, Affiant again emailed Plaintiff's counsel regarding a
20 stipulation and order to extend discovery for the purpose of obtaining phone
21 records. *See* Exhibit B.
- 22 6. Affiant received no response.
- 23 7. On or about August 19, 2015, Affiant duly noticed the deposition of Plaintiff's
24 expert John R. Peterson for September 3, 2015 at 9:00 a.m. *See* Exhibit C.
- 25 8. On or about August 20, 2015, Affiant called Plaintiff's counsel to discuss the
26 extension of discovery. Plaintiff's counsel requested a six-month extension to
27 discovery. Affiant declined to this extension, but tentatively agreed to a 30-60 day
28 extension for Plaintiff to continue her treatment. Affiant memorialized this
 conversation in an email on August 26, 2015, requesting a response from
 Plaintiff's counsel. *See* Exhibit D.
- 29 9. Affiant received no response.

10. Affiant again sent email correspondence to Plaintiff's counsel on August 27,
11. 2015, requesting a response. *See Exhibit E.*
12. Affiant received no response.
13. On or about August 28, 2015, Affiant held a telephonic conference with Paige
14. Hall from Plaintiff's counsel's office. Ms. Hall requested we continue Mr.
15. Peterson's deposition, as he was not available on September 3, 2015. Affiant
16. agreed, provided that Plaintiff's counsel agreed to extend discovery and provided
17. Affiant with a date to which to continue the deposition.
18. Affiant received no response.
19. On or about September 1, 2015, Affiant and Plaintiff's counsel held a telephonic
20. conference, wherein the following stipulations were reached: (a) discovery would
21. be tentatively extended for 30 days to retrieve phone records and medical records,
22. and (b) discovery would be tentatively extended for 30 days for Plaintiff's expert
23. deposition, pending an alternate date and time being provided for the deposition.
24. This conversation was memorialized in an email correspondence. *See Exhibit F.*
25. Affiant sent a proposed Stipulation and Order attached to the September 1, 2015
26. correspondence. *See Exhibit G.*
27. On or about September 2, 2015, Affiant and Plaintiff's counsel held a telephonic
28. conference wherein Plaintiff's counsel advised that the proposed Stipulation and
29. Order was unacceptable as written because it limited discovery, and Affiant
30. asserted the delineation of discovery was in compliance with LR 26-4.
31. Affiant again requested a delineation of discovery remaining in compliance with
32. LR 26-4 to amend the Stipulation and Order. Affiant further requested another
33. date for Plaintiff's expert's deposition. Affiant memorialized this conversation in
34. an email dated September 2, 2015. *See Exhibit H.*
35. Affiant did not receive a response regarding Plaintiff's expert's deposition.
36. Affiant took a Notice of Non-Appearance for John R. Peterson on September 3,
37. 2015.

20. Affiant requested an LR 26-7 conference on September 3, 2015. *See Exhibit I.*
21. Affiant attempted to initiate an LR 26-7 conference on or about September 4, 2015, but Plaintiff's counsel did not answer. Affiant memorialized all pending issues in another written request for an LR 26-7 conference on September 4, 2015.
See Exhibit J.
22. Plaintiff's counsel emailed Affiant regarding the requested LR 26-7 conference on September 8, 2015. *See Exhibit K.* Plaintiff's counsel confirmed he had received Affiant's outline of pending issues. *Id.*
23. On or about September 9, 2015, Affiant and Plaintiff's counsel held the LR 26-7 conference. The following issues were not resolved: (a) both parties agreed to a 30-day extension of discovery, but Plaintiff's counsel could not agree to set forth an itemization of remaining discovery; (b) Plaintiff's counsel refused to reimburse Affiant for the costs and fees incurred in connection with Mr. Peterson's nonappearance for deposition; and (c) Plaintiff's counsel stated he could not update the computation of damages until he obtained additional medical records. Affiant memorialized this conversation in an email dated September 9, 2015. *See Exhibit L.*

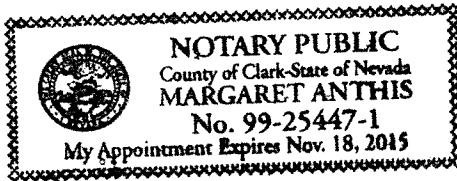
FURTHER AFFIANT SAYETH NAUGHT.

STEPHANIE ZINNA, ESQ.

SUBSCRIBED AND SWORN to before me

this 15 day of September, 2015.

NOTARY PUBLIC in and for said County
and State



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15 day of September, 2015, I served the above
DEFENDANT DOLLAR TREE STORES, INC.'S MOTION TO STRIKE PLAINTIFF'S
EXPERT JOHN R. PETERSON PURSUANT TO FRCP 37(b)(2)(A) through the CM/ECF
system of the United States District Court for the District of Nevada (or, if necessary, by U.S.
Mail, first class, postage pre-paid), upon the following:

Anthony M. Paglia, Esq.
Antony Paglia Injury Lawyer, Ltd.
255 East Warm Springs Road, #100A
Las Vegas, NV 89129
P: 702-830-7070
F: 702-522-054
apaglia@anthonypaglia.com
Attorneys for Plaintiff


An Employee of Olson Cannon Gormley
Angulo & Stoberski

Law Offices of
OLSON, CANNON, GORMLEY, ANGULO & STOBERSKI
A Professional Corporation
9950 West Cheyenne Avenue
Las Vegas, Nevada 89129
(702) 384-4012 Telecopier (702) 383-0701